IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
WESTERN DIVISION

LAJIM, LLC, an Illinois Limited Liability Corporation, PRAIRIE RIDGE GOLF COURSE, LLC, an Illinois Limited Liability Corporation, LOWELL BEGGS, and MARTHA KAI CONWAY,	)	
	)	Case No. 13-cv-50348
Plaintiffs,	)	
	)	Judge Iain D. Johnston
v.	)	
	)	
GENERAL ELECTRIC COMPANY, a New York Corporation,	)	
	)	
Defendant.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S COMBINED PETITION TO AMEND AND CERTIFY THE DECEMBER 18, 2015 ORDER FOR APPEAL PURSUANT TO 28 U.S.C. § 1292(b) AND MOTION TO STAY THE PROCEEDINGS PENDING APPEAL

LAJIM, LLC, Prairie Ridge Golf Course, LLC, Lowell Beggs, and Martha Kai Conway (collectively "Plaintiffs"), hereby respond in opposition to Defendant General Electric Company's ("GE" or "Defendant") Combined Petition to Amend and Certify the December 18, 2015 Order for Appeal Pursuant to 28 U.S.C. § 1292(b) and Motion to Stay the Proceedings Pending Appeal ("Motion"). In support thereof, Plaintiffs state as follows:

INTRODUCTION

GE asks this Court to exercise its discretion, amend its December 18, 2015 Order, and certify for appeal an issue that this Court has already analyzed and found is "not supported by the statutory language," and for which GE has "presented no authority" in support. *See* December 18, 2015 Memorandum Opinion and Order ("Opinion"), Dkt. # 88, at p. 8. Nothing has changed.

The statutory requirements for a § 1292(b) petition are: (i) there must be a controlling question of law as to which there is substantial ground for difference of opinion, and (ii) an immediate appeal from the order must materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

GE unsuccessfully moved for summary judgment on the same question it raises seeking an interlocutory appeal: whether a pending action initiated in state court by the State of Illinois alleging that GE violated the Illinois Environmental Protection Act bars a later filed citizen suit filed pursuant to Section 6972(a)(1)(B) of Resource Conservation and Recovery Act ("RCRA")? This Court considered GE's question and ruled against GE, finding that the clear and unambiguous language of the statutory bar found at §6972(b)(2)(C)(i) provides that only a diligently prosecuted state action specifically invoking § 6972(a)(1)(B) bars later filed citizen suits seeking relief under § 6972(a)(1)(B). *See* 42 U.S.C. § 6972(b)(2)(C)(i); Opinion, p. 11. In other words, the 2004 action initiated by the State of Illinois against GE in Whiteside County Circuit Court (04 CH 28) invoking the Illinois Environmental Protection Act is not a bar to Plaintiffs' citizen suit against GE in this case.

In its December 18, 2015 Opinion, this Court found that (i) GE's position contradicted the clear and unambiguous language of the statute; (ii) GE failed to provide any authority directly supporting its position; and (iii) GE's position was contradicted by clear Congressional intent. *See* Opinion, pp. 7-11. Under the circumstances, the question GE asks the Court to reconsider is not a contestable question for which there is a substantial, if any, difference of opinion. Rather, as described in the Opinion, the matter was settled by Congress, and GE simply disagrees.

Moreover, if the Court were to certify GE's question for interlocutory appeal, and if the Seventh Circuit were to find in GE's favor, this Court would then need to determine the second prong of the statutory bar – whether the state did, or did not, "diligently prosecute" the action as required by § 6972(b)(2)(C)(i). To the extent that this Court noted that nearly thirty years have passed since the presence of the contamination was disclosed by GE, and "no remediation has yet occurred," this inquiry is very likely to be answered in Plaintiffs' favor – in which case GE's appeal would do nothing but return the parties to the *status quo* after a lengthy delay. *See* Opinion, p. 15. GE does not satisfy the criteria set out in § 1292(b) and the Court should deny GE's Motion.

RELEVANT BACKGROUND FACTS

On November 1, 2013, Plaintiffs filed a citizen suit pursuant to 42 U.S.C. § 6972(a)(1)(B) against GE, seeking a mandatory injunction requiring GE to abate an imminent and substantial endangerment involved with GE's contamination discovered at Plaintiffs' property. *See* Amended Complaint, Dkt. # 24. After discovery, on February 27, 2015, Plaintiffs moved for summary judgment on their RCRA claim (Count I of the Amended Complaint). *See* Dkt. ## 38, 68, 83, and 85. Thereafter, GE filed a Cross Motion for Summary Judgment on Plaintiffs' RCRA claim, arguing that Plaintiffs' citizen suit was barred by a state action initiated in 2004 by the State of Illinois against GE in the Circuit Court of Whiteside County, Illinois. *See* Dkt. ## 58, 71, 84, 85. On December 18, 2015, this Court entered its Opinion granting Plaintiffs' Motion for Summary Judgment on its RCRA claim, and denying GE's Cross Motion for Summary Judgment. *See* Dkt. # 88. GE now asks the Court to certify for interlocutory appeal the same question GE raised in its Cross Motion for Summary Judgment.

In its Opinion, this Court unequivocally held that the plain language of the bar articulated in § 6972(b)(2)(C)(i) applies only to actions commenced and diligently prosecuted under § 6972(a)(1)(B), and not to the claims filed under the Illinois Environmental Protection Act. Because the State of Illinois sued GE in state court under state law seeking (i) reimbursement of the state's costs, (ii) fines and penalties attributable to creating water pollution hazards in violation of the Illinois Environmental Protection Act, and (iii) for an injunction prohibiting GE from further violations of the Illinois Environmental Protection Act – and not seeking any relief or remedy under § 6972(a)(1)(B) of RCRA – the Court denied GE's Cross Motion for Summary Judgment. The Court noted that GE had failed to cite any authority supporting its position. Rather, this Court noted that "Congress disagrees with General Electric's position," because Congress' express views, as articulated in the clear and unambiguous language of RCRA, support Plaintiffs' position. Opinion at p. 11.

LEGAL STANDARD

A party seeking interlocutory appeal must satisfy four statutory criteria before the district court may, in its discretion, certify a question for interlocutory appeal: (i) there must be a question of law; (ii) it must be controlling; (iii) it must be contestable; and (iv) its resolution must promise to speed up the litigation. *Ahrenholz v. Board of Trustees of Univ. of Ill.*, 291 F. 3d 674, 675 (7th Cir. 2000). "Unless *all* these criteria are satisfied, the district court may not and should not certify its order to [the Seventh Circuit] for an immediate appeal under section 1292(b). . . . The criteria are conjunctive, not disjunctive" *Id.* at 675-676 (emphasis in original).

Tellingly missing from GE's Motion, the Seventh Circuit also warned, "Section 1292(b) was not intended to make denials of summary judgment routinely appealable[.] . . . A denial of summary judgment is a paradigmatic example of an interlocutory order that normally is not appealable." *Id.* at 676.

Additionally, "[i]nterlocutory appeals are frowned upon in the federal judiciary system." *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir., 2012). Interlocutory appeals interrupt litigation, and therefore delay the conclusion of the litigation. *Id.* Moreover, interlocutory appeals often become "a gratuitous burden on the court of appeals and the parties, as well as a gratuitous interruption and retardant of the district court proceedings." *Id*. As explained below, GE's request for interlocutory appeal is far from the extraordinary circumstance under which a § 1292(b) appeal is appropriate, and its motion should be denied.

ARGUMENT

I. GE's QUESTION IS NOT A CONTESTABLE QUESTION OF LAW.

GE does not present a contestable issue for which there is substantial ground for difference of opinion. GE simply disagrees with the Court's ruling on Summary Judgment, and that is not sufficient to render the question "contestable." In order for an issue to be contestable within the meaning of § 1292(b), the question must be a "difficult central question of law which is not settled by controlling authority," and there must be a "substantial likelihood" that the district court's ruling will be reversed on appeal. *In re Brand Name Prescription Drugs Antitrust Litigation*, 878 F.Supp. 1078, 1081 (N.D.Ill., 1995) (citations omitted). Here, the Court found the relevant statutory language clear and unambiguous – virtually uncontestable.

A. GE's Position Is Inconsistent With the Unambiguous Language of the Statute.

The relevant RCRA citizen suit bar states "[n]o action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment . . . has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section." 42 U.S.C. § 6972(b)(2)(C)(i). The plain language of the statute, therefore, provides that only state actions specifically seeking relief pursuant to 6972(a)(1)(B) will act as a bar to the RCRA citizen suit involved here, and, only so long as the state action was first in time and is being diligently pursued. Here, the state action at issue was brought in state court solely under the purview of a state statute, solely seeking state remedies, and not referring to RCRA or a seeking a mandate to abate an imminent and substantial danger under RCRA. *See Brodsky v. HumanaDental Ins. Co.*, 2014 WL 4813147 at *4 (N.D. Ill. Sept. 29, 2014) (denying motion for interlocutory appeal where movant presented no contestable issue of law because, in part, the statutory language at issue was unequivocal).

Despite the clear language of the statute, GE nonetheless argues that because the United States Environmental Protection Agency ("US EPA") had delegated certain limited authority to Illinois EPA to implement the RCRA subchapter III permit program (and regulations promulgated at 40 CFR Part 261 *et seq*.), that the state action against GE filed in state court alleging GE had violated specific provisions of the Illinois Environmental Protection Act, was an enforcement action "in lieu of" an action brought pursuant to subsection (a)(1)(B) of RCRA.[1] GE takes this position even though RCRA was not even mentioned in the state action, federal jurisdiction was not sought in that action, and the state action was filed in state court.[2]

However, neither Plaintiffs in the citizen suit file here, nor the State of Illinois in the state action, alleged any violation of any permit condition, order or agreement – making GE's reference to the delegation meaningless. Plaintiffs allege only that GE "is contributing the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environmental," and seek relief against GE as provided under RCRA Section 6972(a)(1)(B).

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[1] Congress provided that state permit programs could be authorized "in lieu of" the federal permit program provided at subtitle III. *See* 42 U.S.C. § 6926(b). There is no statutory support for GE's gloss that state actions invoking state law, in state court, could morph into abatement actions under § 6972(a)(1)(B) – or be construed "in lieu of" § 6972(a)(1)(B). There is no need. Congress provided that States are specifically authorized to initiate abatement actions under § 6972(a)(1)(B) and only such an action could be a bar to a subsequently filed citizen suit invoking the same provision.

[2] RCRA places exclusive jurisdiction in federal courts for suits brought pursuant to subsection 6972(a)(1). *See Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1098 (8th Cir., 1989); 42 U.S.C. § 6972(a)(1) ("Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur.")

Simply put, the delegation of authority referred to by GE at 51 FR 3778-09 is limited authority delegated to Illinois EPA to operate the permit program under RCRA subchapter III. It is not a delegation of all authority under all of RCRA. It is not a delegation of the authority of the federal authorities to "over file" against a party. It is not a delegation to the Illinois Environmental Protection Act (as sometimes mentioned by GE). And it is most certainly not a delegation of authority otherwise provided by Congress to citizens to act as private attorneys' general in order to enforce RCRA Section 6972(a)(1)(A) in conjunction with other authorities. *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 501 (7th Cir. 2011) ("[RCRA] permits citizen and government lawsuits to be prosecuted simultaneously, so long as the citizen-plaintiffs have complied with the notice and prior filing requirements of the statute. . . .").

Congress really meant it. According to the Seventh Circuit in *Adkins*, "Congress chose not to place absolute faith in state and federal agencies. It provided for citizen suits to enable affected citizens to push for vigorous law enforcement even when governmental agencies are more inclined to compromise or go slowly." *Id.* at 501. Congress intentionally provided citizens with the right to step in the shoes of the Attorney General in order enforce federal environmental liability. It is the policy of the United States that those who contribute to "the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environmental" are subject to an order requiring them to clean it up – in addition to any other liability or responsibility that person may face under state or federal statute or common law. 42 U.S.C. § 6972(a)(1)(B).

While Congress authorized states to implement permit programs consistent with RCRA subtitle III, the citizen suit is found in subchapter VII of RCRA – a completely different subchapter of RCRA, and a subchapter that Congress did not authorize delegation to the states, and a subchapter which US EPA did not delegate to the State of Illinois "in lieu" of the Federal statutory scheme as suggested by GE. There was no need to – states, like private attorneys general, could seek to enforce § 6972(a)(1)(B) by simply following the statute. Here, the State of Illinois chose, instead, to seek an unrelated remedy under an unrelated state statute. Here, with the plain reading of the statute under review, there is no contestable issue of law – just GE's misunderstanding.

US EPA is authorized by statute to delegate authority to the states to operate a proper permit program regulating current operations under Subtitle III of RCRA. *See* 42 U.S.C. § 6926(b). However, it is wrong to conclude that any such delegation involves any other provision or chapter in RCRA, or that the delegation is a bar to RCRA citizen suit because the state sought relief under a wholly unrelated state statute.

B. GE's Policy Concerns Are Trumped By Congress' Express Views.

GE argues that the Court should exercise its discretion in certifying the appeal based on policy concerns raised by GE involving federal court interference with ongoing matters being litigated in state court. However, in the Opinion, the Court respectfully acknowledged GE's concern, and held that those concerns are trumped by the express views of Congress. Adkins, 644 F.3d at 501 (7th Cir. 2011) ("Where a citizen suit has satisfied [RCRA's statutory] conditions and is not statutorily barred, Congress has expressed its intent that the citizen suit should proceed. . . . Congress was not troubled by 'piecemeal litigation' and the potential for inconsistent outcomes . . . ."). The clear and unambiguous language of RCRA was implemented by Congress after careful consideration of the very concerns that GE raises now.

In addition, Congress also provided that potential citizen suit plaintiffs must provide adequate notice to state and federal authorities in order to mitigate the concerns raised by GE. *See* RCRA § 6972(b). In the end, Congress determined that the risks were outweighed by a desire to quickly and adequately abate situations that amount to imminent and substantial dangers. As the Court recognized in its Opinion, "[t]he clear language of RCRA establishes the intentional Congressional policy decision that this Court cannot ignore." Opinion at p. 11.

Moreover, the policy concerns raised by GE at oral argument and in its Motion are unwarranted, as Plaintiffs are not seeking a "collateral attack on the [state's] strategy or tactics." *Supporters to Oppose Pollution Inc. v. The Heritage Group*, 973 F. 2d 1320 (7th Cir. 1991).[3] Rather, Plaintiffs seek remediation efforts *in addition to* the efforts sought by the state. It is incongruent and disingenuous for GE to argue that, despite the fact that GE polluted large portions of the City of Morrison and the golf course, GE should not be required to undertake remedial efforts sought by the property owners because at some point, the state *might* require GE to do something. It has been 29 years and GE has not performed any remediation. Rather, GE suggests that the contamination will, eventually, "naturally attenuate." In other words, "leave it alone, it will eventually go away." Thus far, however, the contamination has not "naturally

[3] The other cases cited by GE in support of its argument that the Court should deny injunctive relief where the remedy would second guess ongoing state action are distinguishable. First, in *87 Street Owners Corp v. Carnegie Hill-87th Street Corp*., 251 F. Supp. 2d 1215 (S.D.N.Y. 2002), the district court found that the relief requested by plaintiffs was not actually necessary but only something "that might speculatively be necessary at an unpredictable future point." *Id*. at 1222. By contrast, here Plaintiffs seek injunctive relief that is currently necessary to remediate an imminent and substantial endangerment to health and the environment. Second, in *3000 E. Imperial, LLC v. Robertshaw Controls Co*., 2010 U.S. Dist. Lexis 138661 (C.D. Cal 2010), because the parties had executed a settlement agreement in which defendant agreed to undertake remediation until complete, the court refused to enter an injunction ordering defendant to do the same thing. Here, Plaintiffs have identified an imminent and substantial endangerment to health and safety caused by GE that is not being remediated. That is the point.

attenuated." It remains present at the golf course at concentrations orders of magnitude greater than the maximum contaminant level approved by US EPA.

Plaintiffs are entitled to the injunctive relief granted to them by Congress, a right that cannot be barred because GE second guesses Congress on policy concerns. Barring Plaintiffs' lawsuit based solely on these policy concerns would simply be improper abstention, and would conflict with the clear language of Congress that the Seventh Circuit warned against in *Adkins*. "To abstain in situations other than those identified in the statute thus threatens an 'end run around RCRA,' and would substitute our judgment for that of Congress about the correct balance between respect for state administrative processes and the need for consistent and timely enforcement of RCRA." *Adkins*, 644 F.3d at 497, *citing PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998) and *Chico Service Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 31 (1st Cir., 2011).

C. GE Has Presented No Authority Supporting Its Position.

None of the cases relied on by GE support its position that the Court should ignore the unambiguous statutory language and clear Congressional intent. In the Court's Opinion, the Court thoroughly analyzed and distinguished each case relied on by GE. Plaintiffs will not repeat the Court's analysis here, but only note that GE has not provided any additional support in its Motion. It is not difficult to reconcile the lack of authority GE refers to, however. The state enforcement action does not even pretend to invoke RCRA. The state sought only to be reimbursed for out-of-pocket expenses in responding to the danger posed by GE's uncontrolled contamination, as well as fines and stipulated penalties for the violations of the Illinois Environmental Protection Act, and a mandatory injunction directing GE to never violate the Illinois Environmental Protection Act again. There was no reference to abate an imminent and substantial danger, and never once was RCRA invoked. GE should not be surprised that there is no authority for its position, because RCRA is irrelevant in these state actions.

GE does cite *Adkins*, pointing the Court to obiter dictum in footnote #2. Motion at p. 5. In *Adkins*, the issue before the Seventh Circuit was a citizen suit brought pursuant to RCRA § 6972(a)(1)(A) and (a)(1)(B). The Seventh Circuit noted in footnote 2 that:

> Although the district court found that section 6972(b)(2)(C)(i) could operate as a bar [to an (a)(1)(B) claim] if the State had commenced its own RCRA "endangerment" action, the parties failed to address whether [the State's] suits could constitute such an action "under" RCRA. Ultimately, the district court did not reach this question because it found the that [sic] the *Colorado River* and *Burford* abstention doctrines counseled against hearing the plaintiffs' RCRA "endangerment" claim. Although we hold that the district court's decision to abstain was an abuse of discretion, [defendant] has not renewed on appeal any argument it may have that the plaintiffs' "endangerment" claim was statutorily preempted under section 6972(b)(2)(B) or (b)(2)(C)."

Adkins, 644 F.3d at 491, fn 2.

That is, while the district and circuit courts in *Adkins* recognized, as this Court did, that an earlier filed and otherwise proper state action under RCRA § 6972(a)(1)(B) is a bar to a later filed citizen suit brought pursuant RCRA § 6972(a)(1)(B), neither the Seventh Circuit nor the district court in *Adkins* ever reached the question of whether a state lawsuit brought pursuant to state law could act as a bar to a later filed citizen suit brought under subsection § 6792(a)(1)(B).

GE completely misrepresents the Seventh Circuit's dictum and the district court's holding when it states that the Seventh Circuit "acknowledged and left standing the district court's ruling that, indeed, the state action under its equivalent 'endangerment' claim did act as a bar, but did not specifically rule on the issue because it was not raised by either party on appeal." Motion at p. 5. Rather, the district court in *Adkins* did *not* rule or even consider the question because the district court (wrongly, according to the Circuit Court) decided the case on abstention grounds. Clearly, then, the Seventh Circuit did not leave standing any such district court ruling. *See Adkins v. Will*, 2010 WL 1652953, at *5 (N.D.Ind., Apr. 21, 2010) ("The parties have not carefully parsed the statutory provisions setting out the preclusive effects of governmental enforcement efforts, and so have not identified or addressed these questions. At this stage, I will likewise not undertake that analysis without the parties having raised the issues and offered their input [. . .]") *judgment reversed by Adkins*, 644 F.3d at 483. This Court should not grant credence to GE's attempt to create a contestable question by misrepresenting case law.

GE has engaged in a tortured analysis of the statutory bar in an attempt to transform the narrow, well-defined 6972(b)(2)(C)(i) citizen suit bar into something broad and poorly defined and which, according to GE, needs judicial interpretation. To the contrary, the statutory bar is clear and unambiguous, and does not need further interpretation. GE's interpretation is contradicted by clear Congressional intent and finds no support in any controlling or persuasive case law. As such, GE utterly fails to present a contestable question of law as required for a § 1292(b) appeal.

II. THE QUESTION POSED BY GE IS NOT A CONTROLLING QUESTION OF LAW.

GE asserts that the question it presents for interlocutory appeal is controlling because, if the appeal were granted and the Seventh Circuit were to find in GE's favor, then "Plaintiffs' RCRA citizen suit is barred by the prior overlapping Illinois state action" and the Court must dismiss Plaintiffs' Amended Complaint. *See* Motion, p. 4. Again, GE misrepresents the relevant law and this Court's Opinion.

While GE has presented a question of law (used in § 1292(b) to mean a question regarding the meaning of a statutory or constitutional provision), it is incorrect to conclude that GE's question is controlling. *Ahrenholz* 291 F. 3d at 675. A "controlling" question of law is one that, if answered in the movant's favor, is likely to end the litigation. *See, e.g., In re Text*

Messaging Antitrust Litigation, 630 F.3d 622, 624 (7th Cir., 2010) (whether a complaint states a claim under *Twombly* pleading standards is a controlling question of law because, if the complaint does not state a claim, the case is likely to be over). The question presented by GE, however, is only one half of a two-part inquiry that the Court must analyze in order to determine whether Plaintiffs' RCRA citizen suit is precluded by the citizen suit bar found in subsection (b)(2)(C)(i). Therefore, even if the Seventh Circuit were to find in GE's favor, Plaintiffs' RCRA claim could not be dismissed without further analysis by this Court: that is, whether or not the state's prosecution was diligent.

Specifically, § 6972(b)(2)(C)(i) provides that "[n]o action may be commenced under subsection (a)(1)(B) of this section if the State . . . has commenced *and is diligently prosecuting* an action under subsection (a)(1)(B) of this section." 42 U.S.C. § 6972(b)(2)(C)(i) (emphasis added). Two questions, therefore, must be answered before the citizen suit bar may be enforced to preclude Plaintiffs' RCRA claim: first, the state must have brought an action under subsection (a)(1)(B) *and second*, the state must have been diligently prosecuting that action the entire time.

Throughout the litigation, Plaintiffs have consistently maintained that the state has not diligently prosecuted its state law case against GE, as evidenced by the fact that in the eleven years since it sued, and 29 years after contamination was first discovered, the state has done nothing to compel GE to actively remediate the remarkably serious contamination. *See* Plaintiffs' Response to GE's Cross Motion for Summary Judgment, Dkt. # 68, p. 14. Indeed, the contamination remains prevalent in and around Morrison, Whiteside County, Illinois, and at very high concentrations. Because the Court found that RCRA § 6972(a)(1)(B) was not the basis for the state's suit, it did not address whether or not the state had diligently prosecuted the case against GE for all or any part of the last 3 decades. Opinion, p. 11, footnote 3. However, whether the state has or is diligently prosecuting its case against GE is a question that must be resolved before the Court may determine that the state's action bars this case. The question presented by GE, therefore, is not a controlling question of law.

The three truly controlling questions of law in this litigation are found in Plaintiffs' Motion for Summary Judgment. They are: (1) whether the defendant has generated solid or hazardous waste; (2) whether the defendant is contributing to or has contributed to the handling of this waste; and (3) whether this waste may present an imminent and substantial danger to health or the environment. *Albany Bank & Trust Co. v. Exxon Mobil Corp*., 310 F. 3d 969, 972 (7th Cir. 2002). GE conceded that Plaintiffs can establish the first two questions. *See* GE's Response to Plaintiffs' Motion for Summary Judgment, Dkt. # 58, at p. 12. The Court found that Plaintiffs established the third element, and held that GE was liable under RCRA. Opinion, p. 18. These three questions of law are the controlling questions in this litigation, though none are currently before the Court in GE's Motion. Because GE has failed to present a controlling question of law to the Court for certification for appeal, the Court should deny GE's Motion.

III. RESOLUTION OF THE QUESTION POSED BY GE WILL NOT MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION.

GE also wrongly asserts that resolution of the question presented in its favor will advance the ultimate termination of the litigation and will prevent this Court from spending time consuming efforts determining the injunctive relief to which Plaintiffs are entitled. GE again glosses over the second prong of the citizen suit bar, which the Court did not address in its Opinion. Merely asking the Seventh Circuit resolve the question presented by GE will not materially advance the ultimate termination of the litigation, because if the Seventh Circuit finds in GE's favor, this Court will still need to analyze the diligence of the state's prosecution efforts.

In doing so, this Court may very likely find that because the state has not diligently prosecuted GE, the citizen suit bar does not apply, leaving the parties exactly where they are now.

Because GE has failed to satisfy *any* of the criteria required for the grant of a § 1292(b) petition, let alone *all* criteria as required, the Court should deny GE's Motion.

IV. THE COURT SHOULD NOT STAY THIS MATTER PENDING APPEAL.

Should the Court grant GE's petition and certify the question raised by GE for interlocutory review, the Court should not stay the district court proceedings pending the Seventh Circuit's review. Count I of Plaintiffs' lawsuit, for which the Court has found in Plaintiffs' favor as to liability, alleges that there is an "imminent and substantial endangerment to health or the environment." The Court should not delay remediation of this imminent and substantial endangerment based on GE's Motion. While GE claims that it continues to work, with and under the direction of the state, it is clear that GE's and the state's efforts have been ineffective and have left large portions of Whiteside County, Illinois contaminated and unsafe to this day. Again, after 29 years, no remedial action has occurred and GE maintains that eventually the chlorinated solvents will "naturally attenuate."

CONCLUSION

GE has failed to satisfy the criteria required for an interlocutory appeal under 28 U.S.C. § 1292(b). Therefore, Plaintiffs respectfully request that the Court deny GE's Motion and refuse to certify an interlocutory appeal from the December 18, 2015 Memorandum Opinion and Order. Should the Court decide, in its discretion, to certify appeal, it should not stay the district court proceedings pending the Seventh Circuit's disposition of the appeal.

Dated: January 15, 2016

Respectfully submitted,

LAJIM, LLC, PRAIRIE RIDGE GOLF COURSE, LLC, LOWELL BEGGS, and MARTHA KAI CONWAY

By: /s/ William J. Anaya
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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2016, I electronically filed the attached **Plaintiffs' Response to Defendant's Combined Petition to Amend and Certify the December 18, 2015 Order for Appeal Pursuant to 28 U.S.C. § 1292(b) and Motion to Stay the Proceedings Pending Appeal** with the Clerk of the United States District Court for the Northern District of Illinois - Western Division, using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ William J. Anaya

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